

OVERVIEW OF CANADA'S *SPECIES AT RISK ACT*

Responsibility for the conservation of wildlife in Canada is shared among the Governments of Canada. The Federal Government has jurisdiction over aquatic species by virtue of the *Fisheries Act* (with shared provincial and territorial responsibilities over certain endangered aquatic species), and over migratory birds falling under the *Migratory Birds Convention Act, 1994*. Jurisdiction for other wildlife species, including birds not protected under the *Migratory Birds Convention Act, 1994*, rests with the provincial or territorial governments.

The *Species at Risk Act* (Annex 1) is one of three major components in the Government of Canada Strategy for the Protection of Species at Risk. Currently, there are over 500 wild plant and animal species protected under the SARA. The other two components of that strategy are the Habitat Stewardship Program and the Accord for the Protection of Species at Risk, which were endorsed by the provinces (except Quebec) territories and the Government of Canada.

The SARA is designed as a key tool for the conservation and protection of Canada's biological diversity and fulfils an important commitment under the United Nations *Convention on Biological Diversity*. The Act complements existing federal, provincial and territorial legislation protecting wildlife.

The purposes of the SARA are to prevent wildlife species from becoming extinct or extirpated, help in the recovery of extirpated, endangered or threatened species as a result of human activity, and to manage species of special concern to prevent them from becoming endangered or threatened.

More specifically, and among other purposes, the Act:

- formally establishes the Committee on the Status of Endangered Wildlife ("COSEWIC") in Canada as an independent body of experts responsible for assessing and identifying species at risk;
- requires that the best available knowledge be used to define long and short-term objectives in a recovery strategy and action plan;
- creates a public registry to assist in making documents under the Act more accessible to the public; and
- is consistent with Aboriginal and treaty rights and respects the authority of other federal ministers and provincial governments.

Consultation and cooperation with Canadians are essential to the protection of wildlife species in Canada. As such, provisions for consultation and cooperation are key elements of the SARA.

Species of Special Concern

Under the SARA, species of special concern are managed to prevent them from becoming endangered or threatened. This is to be accomplished through the development of a management plan that includes measures for the conservation of the species. Under subsection 68(1) of the Act, the Minister, or other competent minister depending on the species, in cooperation with other interested parties, must prepare a proposed management plan and include it on the SARA

Public Registry within three years of a wildlife species being listed as a species of special concern.

Interested parties may include federal, provincial, and territorial ministers, WMBs, Aboriginal organizations, and any other person or organization that the Minister considers appropriate such as landowners and lessees. In preparing a management plan, the Minister may adopt a multi-species or ecosystems approach. Under the Act, once a management plan has been included in the public registry, any person may file written comments with the Minister within 60-days. Within 30 days of the closing of the public comment period, the proposed management plan must then be finalized and the Minister, after considering the comments received, must include a copy of the plan in the public registry. Management plans are evaluated every five years and updated as necessary to accommodate new information. Finally, under SARA section 24, COSEWIC must review the classification of each species at risk at least once every ten years, or at any time if it has reason to believe that the status of the species has changed significantly.

The SARA Designation Process

The SARA separates the scientific assessment, conducted by the independent COSEWIC, from the listing decision (Figure 1) made by the Government of Canada.

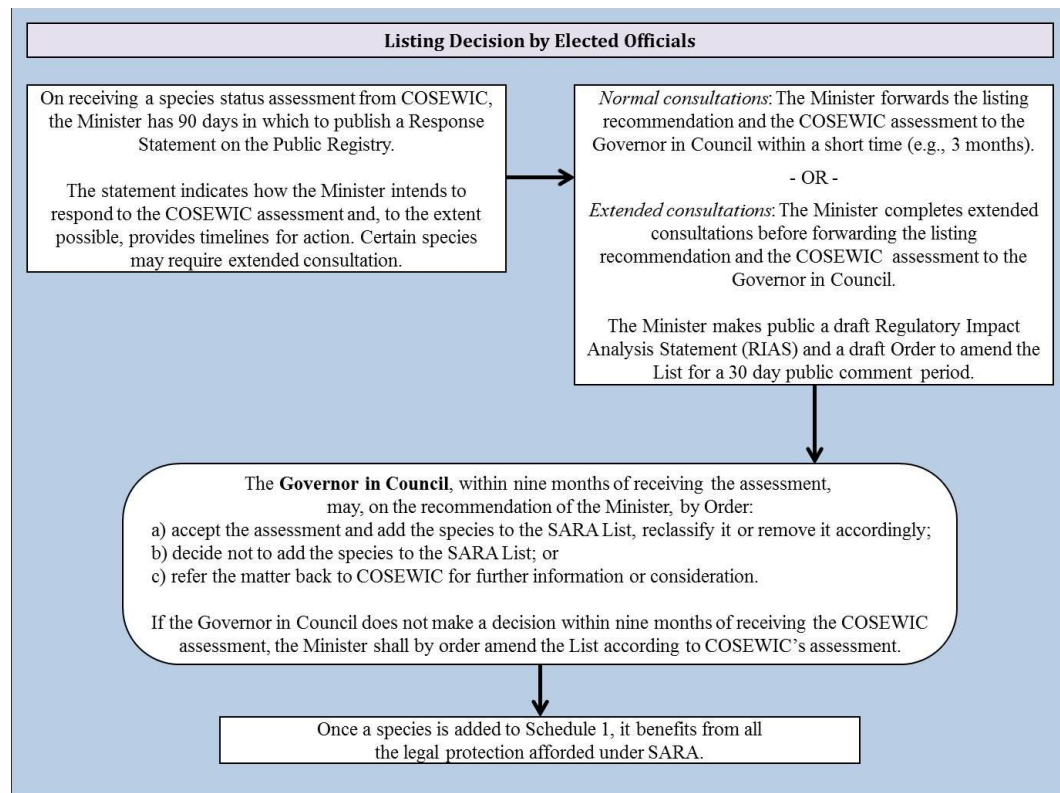


Figure 1. The species listing decision process under the SARA.

Receipt of Assessment

The process of the Government's listing decision (Figure 1) begins once COSEWIC sends its completed, final assessment and supporting evidence, including the rationale and status reports, for species classified as at risk (i.e., extirpated, endangered, threatened or of special concern) to the Minister of the Environment, who is the minister responsible for the administration of the SARA, and to the Canadian Endangered Species Conservation Council ("CESCC"). This happens once per year. Over 600 species status assessments have been received by the Minister from COSEWIC following this process, which was established by agreement through an exchange of correspondence between the Minister and COSEWIC in 2003 (Annexes 4 and 5). Under that agreement, pursuant to SARA section 26, the chair of the COSEWIC sends annually a letter to the Minister and CESCC which includes the completed status report. As the COSEWIC assessment and the reasons for it must also be posted on the SARA Public Registry, these documents must be available in both official languages, pursuant to Canada's *Official Languages Act*. Posting on the SARA Public Registry is controlled by Environment Canada, which makes COSEWIC's final assessments available on the registry once they are provided to the Minister.

Response Statement

Following receipt of the COSEWIC assessment and supporting evidence, the Minister has 90 days in which to publish a Response Statement on the SARA Public Registry, as required under SARA subsection 25(3). These statements indicate how the Minister intends to respond to each COSEWIC assessment and, to the extent possible, provide timelines for action and the extent of consultations.

Consultations

In the response statement, the Minister reports on which consultation path the species will follow. For normal consultations, the Minister forwards the species assessments to the Governor in Council within a short time (2-3 months) of the posting of the response statements on the SARA Public Registry, for example, within three months.

Under some circumstances, the listing of a species could have significant and widespread impacts on the activities of Aboriginal peoples, industry or Canadians at large. In such cases, affected citizens need to be informed of the pending decision and, to the extent possible, its potential consequences. They also need the opportunity to express their opinions and share ideas on how best to approach the protection and recovery of the species. Accordingly, extended consultations are undertaken. Where existing land claims agreements apply to eligible terrestrial species, such that they fall under the authority of a wildlife management board, the Minister must seek a decision from the relevant board(s). More information on land claims agreements and Canada's duty to consult is provided below.

Aboriginal peoples identified as affected by a listing decision are consulted. As northern communities are widespread and people are often only available for consultations when they are not away hunting, these consultations take time. In addition to the public, Environment Canada

consults with the governments of the provinces and territories responsible, under their respective legislation, for the conservation and management of certain wildlife species. Environment Canada also consults with other federal departments and agencies where they have responsibilities under SARA.

Environment Canada sends notice of consultations to other recognized stakeholders, identified concerned groups, and individuals who have made their interests known. These include, but are not limited to, industries, industry groups and resource users, landowners, land users and environmental non-government organizations.

The results of the consultations are of great relevance to the process of listing species at risk. For those species undergoing extended consultations the Minister will not forward the assessments to the Governor in Council until the consultation requirements established in the SARA and land claims agreements (as discussed below) and common law have been met. In other words, only once these consultations are completed does the Minister forward his recommendation and the COSEWIC assessment to the Governor in Council, otherwise the Minister is subject to challenge from Aboriginal groups for lack of consultation.

Canada's Duty to Consult

An important aspect of implementing the *Species at Risk Act* involves recognizing the important role that Canada's Aboriginal peoples play in wildlife management. This involvement flows from the rights of Aboriginal peoples to maintain their traditional ways of life and culture, enshrined by section 35 of the *Constitution Act, 1982*:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

The SARA further supports this constitutional recognition within the overall objectives of wildlife conservation by, notably, affirming that nothing in the Act shall be construed to abrogate or derogate from aboriginal or treaty rights (section 3), committing to consider aboriginal traditional knowledge (preamble and subsection 15(2)), and affirming the government's statutory duty to consult with relevant wildlife management boards in respect of the listing of wildlife species (subsection 27(2)).

In addition to the statutory requirement to consult Boards (and affected Aboriginal groups in other parts of the SARA), the common law duty to consult adversely impacted Aboriginal groups may arise. The Crown's duty to consult Aboriginal peoples is a part of Canadian law as set out by the Supreme Court of Canada's *Haida* ([2004] 3 S.C.R. 511) and *Taku* ([2004] 3 S.C.R. 550) decisions. The duty calls for the Government to consult with Aboriginal groups in circumstances where government decisions have the potential to adversely impact existing Aboriginal rights. The appropriate scope of consultation, and accommodation if appropriate, is to be proportionate

to the strength of the asserted aboriginal right and the potential for adverse impact on those rights.

In addition to the common law duty to consult, the Government of Canada must respect consultation obligations under Land Claim Agreements (LCAs) which it has signed with Aboriginal peoples in Canada in the Yukon, the Northwest Territories, northern Quebec, and Newfoundland and Labrador. These agreements are recognized by section 35 of the *Constitution Act, 1982*. A number of these LCAs establish wildlife management boards responsible for regulating access to and managing wildlife in their respective settlement areas. At the same time, subsection 27(2)(c) of the SARA requires that the Minister consult the WMBs before making a recommendation to the Governor in Council on the listing a wildlife species found within the settlement area.

For example, under the Nunavut LCA, its WMB is authorized to approve the designation of species at risk found on the settlement area. As such, the Minister presents the proposed listing to the WMB for approval of the designation. Once the Minister has received a decision from the WMB with regard to the proposed listing, he then has 60 days to accept it or to give written reasons for rejecting it. If he does not respond within 60 days he is deemed to have accepted the Board's decision and must then implement that decision. Where the Minister rejects the WMB decision, the board must reconsider the decision in light of the reasons provided by the Minister and then make a final decision. After receiving a final decision of the WMB, the Minister may then accept or reject the final decision, or vary it, before making a recommendation to the Governor in Council.

Recommendation to the Governor in Council

The Minister's recommendation to the Governor in Council is informed by COSEWIC's independent assessment, the public comments received during the consultation period, and the decisions of the WMBs. He then weighs the potential consequences, including the socioeconomic impacts, of accepting the COSEWIC status assessments and amending the List before making his recommendation and forwarding COSEWIC's assessment to the Governor in Council.

When the Minister makes a recommendation with respect to listing, he does so on the basis of the Governor in Council's three possible courses of action set out in subsection 27(1.1): he can recommend the Governor in Council accept the COSEWIC assessment and list the species accordingly, decide not to add it, or refer it back to COSEWIC. There is no option available under SARA to vary COSEWIC's assessment, ensuring that the species' status on the List reflects the concerns of science.

Regulatory Impact Analysis Statement

Environment Canada carefully reviews and evaluates comments received during the consultations, and document the comments in a Regulatory Impact Analysis Statement ("RIAS"). The RIAS, a description of the regulatory proposal, includes a description of the nature, content and results of consultations, including with WMBs when required, and an

analysis of the expected impact. It is an integral part of the federal regulatory process. The draft Order proposing to list the species under consideration is published, along with the draft RIAS, in Canada Gazette, Part I for a comment period of 30 days. Once the Governor in Council makes a decision on the listing, the Order and RIAS is finalized and published in Canada Gazette, Part II.

Decision to Amend the List in Respect of the Assessment

As provided under subsection 27(1.1) of the SARA, the Governor in Council within nine months of receiving the assessment may, on the recommendation of the Minister, by order:

- accept the assessment and add the species to the List;
- decide not to add the species to the List; or
- refer the matter back to COSEWIC for further information or consideration.

If the Governor in Council has not taken one of the three courses of action within nine months of receiving the assessment from the Minister, the Minister shall amend the List in accordance with COSEWIC's assessment, as required under SARA 27(3). Once a species is added to the List, it benefits from the legal protection afforded under SARA and its mandatory management and recovery planning.